Supreme Court, U.S.
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No. 01- ~

IN THE

Supreme Court of the United States

PATRICK BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Do the Sixth Amendment and Rule 18, Fed.R.Crim.P., permit venue in a money laundering prosecution to be laid in any district in the United States where a bank happens to process a monetary transaction?

II.

Does the cumulative prejudicial effect of multiple non-reversible plain errors in jury instructions, which omitted and misdescribed essential elements of the offenses, render a trial fundamentally unfair and a violation of due process of law?

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OPINIONS BELOW

The May 31, 2001 Summary Order of the United States Court of Appeals for the Second Circuit, affirming petitioner's convictions, is unreported. It is reproduced in the Appendix at pp. 18-25a. The May 31, 2001 opinion vacating the petitioner's sentence and remanding for resentencing is reported at *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001). It is reproduced in the Appendix at pp. 1-17a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final judgment of the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1254(1). A timely petition for rehearing and rehearing *en banc* was denied on October 29, 2001. App. 26-27a. On January 23, 2002, Circuit Justice Ruth Bader Ginsburg granted an extension of time until February 11, 2002 for filing the petition for writ of certiorari.

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

Rule 18, Fed.R.Crim.P.

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.

Rule 52, Fed.R.Crim.P.

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner Patrick R. Bennett was the Chief Financial Officer of the Bennett Funding Group, Inc. ("BFG"), a privately-owned family business in Syracuse, New York. In March 1996, petitioner was charged with perjury and securities fraud in connection to his role at BFG. In June 1997, a federal grand jury in the Southern District of New York returned an indictment charging him with perjury, obstruction of justice, securities fraud, mail fraud, bank fraud, and money laundering. A superceding indictment was returned in October 1998. The superceding indictment alleged the same offenses separated into four categories. First, petitioner was alleged to have run a pyramid scheme through BFG, selling allegedly fictitious leases to investors and pledging or selling legitimate leases twice over to different parties. The pyramid scheme allegations supported the indictment's mail fraud and securities fraud counts. Second, petitioner was alleged to have shifted the cash generated by the pyramid sales into an unaudited shell company, supporting the numerous money laundering counts. Third, petitioner was alleged to have inflated BFG's profitability in financial statements submitted to banks and investors who loaned money to BFG. Those allegations supported the bank fraud and additional securities fraud counts. Fourth, petitioner was alleged to have deceived SEC investigators, supporting the counts of perjury and obstruction of justice. *United States v. Bennett*, 252 F.3d 559, 560-61 (2d Cir. 2001). App. 2-3a. Prior to petitioner's first trial, he moved to dismiss the money laundering counts on the grounds that venue was improper in the Southern District of New York. The district court denied that motion, after which petitioner moved for a change a venue based, in part, on improper venue in the Southern District of New York for the money laundering counts. That motion was also denied.

Petitioner's first trial commenced in December 1998 and lasted three months. The petitioner testified and admitted to the perjury and obstruction counts, while denying all other charges. After eight days of deliberations, the jury convicted petitioner only on the perjury and obstruction counts to which he had admitted, and could not reach a verdict on all other charges. App. 3a.

A second trial commenced in May 1999. At the close of the government's case, petitioner moved to dismiss the money laundering counts due to improper venue. The jury in the second trial could not reach a verdict on the pyramid scheme counts, but convicted on the money-laundering counts and on the bank fraud and securities fraud counts related to the allegedly inflated financial statements.

The district court sentenced petitioner to 360 months incarceration. The Sentencing Guideline range was 188 – 235 months, but the court departed upward, adding 125 months to the sentence. Five months of the upward departure were imposed based on the magnitude of the fraud. The remaining 120 months were imposed based on the petitioner's wife's refusal to give her house and real property to the government after the district court found those properties to be fraud proceeds.

On appeal, petitioner challenged his convictions on multiple individual grounds, as well as on the cumulative prejudicial effect of the individual errors. The court of appeals rejected petitioner's challenges to his convictions in the Summary Order dated May 31, 2001. App. 18a.

The court of appeals acknowledged a number of errors by the district court in the conduct of the second trial, but found none rose to the level of "plain error." Specifically, the court

of appeals found that the district court did not instruct the jury that materiality was an element of the bank fraud counts. *See Neder v. United States*, 527 U.S. 1, 25 (1999) (materiality of falsehood held to be an essential element of the bank fraud statutes). However, it found that "the failure to do so was not plain error." App. 20a. The court of appeals also acknowledged that the district court should have repeated the unanimity instruction for various charged offenses because of the complexity of the case. Again, the court of appeals found the error not to be plain. App. 21a. The district court's failure to tell the jury that an "intent to harm" was required to sustain the bank fraud counts was also recognized by the court of appeals, but also dismissed as not plainly erroneous. *Id.* Further, the court of appeals specifically noted that the "no ultimate harm" instruction was erroneous and identical to an instruction held to be plainly erroneous in *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998), but citing a factual distinction, the court rejected petitioner's challenge to this instruction. App. 22a. Finally, the court of appeals agreed that the wording of the conscious avoidance instruction was erroneous because it lacked an "actual belief" proviso. App. 22-23a.

Petitioner had argued that the cumulative effect of these and other errors denied him his Constitutional right to a fair trial by a properly instructed jury. Further, petitioner argued that the cumulative effect of these errors was evidenced by the jury's fundamental misunderstanding of the district court's instructions when it asked during deliberations if the counts other than Count 1 (securities fraud) required the element of intent. Appellant's Brief, pp. 41–44. The court of appeals failed to address either argument in its Summary Order of affirmance. Notably, the court of appeals did not conclude the

evidence against Petitioner was overwhelming or that the jury instruction errors were harmless.

Petitioner also challenged his convictions on the grounds that venue was improper in the Southern District of New York for all counts. Appellant's Brief, pp. 84-88. In particular, petitioner argued that venue was improper for the money laundering and monetary transaction counts because neither petitioner nor anyone from BFG committed any act in furtherance of these offenses in the Southern District of New York. *Id.* at 85. Instead, the only acts that took place in the Southern District were "back office" bank processing functions that were wholly fortuitous. *Id.* The court of appeals agreed that the bank functions were "minor ones, and were not committed by [petitioner] or anyone at his company . . ." App. 24-25a. Nonetheless, the court held that the "back office" bank functions "were part of the crime described by those statutes and therefore sufficed to support venue in the Southern District." *Id.* The court of appeals also noted that the court in the Southern District "was particularly suitable for 'accurate factfinding,' *Reed*, 773 F.2d at 481, because the district in question is a financial center where money laundering cases are frequently tried." App. 25a.

Petitioner also challenged his sentence on appeal on number of grounds. In a published opinion separate from its Summary Order, the court of appeals vacated petitioner's sentence, holding that the 120–month upward departure based on petitioner's wife's refusal to surrender her interest in property was improper. App. 1-17a. The court rejected petitioner's other challenges to his sentence, and remanded the case to the district court for resentencing.

Petitioner moved for a stay of resentencing pending this Petition for Certiorari. The district court granted petitioner's motion. Petitioner remains incarcerated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION REGARDING THE *LOCUS DELICTI* OF MONEY LAUNDERING

This case presents the important, but unanswered, venue question of whether a defendant charged with money laundering offenses may be tried in any district in which his funds happened to have been processed by a financial institution. The court below held:

> [V]enue on the money-laundering and monetary transactions counts was proper because the back office processing by the banks and clearing agents (required to shift the money to the unaudited accounts) took place in Manhattan, making the Southern District one site where the financial transactions criminalized by sections 1956 and 1957 could be said to have been conducted. Although these steps in the commission of the offense were minor ones, and were *not committed by Bennett or anyone at his company*, they were part of the crime described by those statutes and therefore sufficed to support venue in the Southern District.

App. 24-25a (emphasis supplied).

The "crimes described" are money laundering under 18 U.S.C. § 1956(a)(1)B(i) (counts 42-44, 46-69, 71-72 and 77) and monetary transactions with criminally derived property under 18 U.S.C. § 1957 (counts 85-87, 89, 91). Both statutes focus on the acts of the individual charged: "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some unlawful activity, conducts or attempts to conduct such a financial transaction . . . ." (§ 1956); "Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property . . . ." (§ 1957).

This Court has framed the relevant venue inquiry:

> As we confirmed last Term, the "'*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699 (1946)). In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts. *See Cabrales, supra*, at 6-7, *Travis v. United States*, 364 U.S. 631 (1961); *United States v. Cores*, 356 U.S. 405, 408-409 (1958); *Anderson, supra,* at 703-706.

United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999).[1]

The venue question is founded on the Sixth Amendment's command that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Accordingly, Rule 18 of the Federal Rules of Criminal Procedure provides that "prosecution shall be had in a district in which the offense was committed."

The constitutional right to be tried where the crime was committed was the product of the colonists' dissatisfaction with the King of Great Britain. "The Declaration recited among injuries and usurpations attributed to the King: `transporting us beyond Seas to be tried for pretended offenses.' The Declaration of Independence, para 21 (1776)." *United States v. Cabrales*, 524 U.S. 1, 6, n. 1 (1998).

Under the Government's construct, which was accepted by the court of appeals in this case, one charged with money laundering offenses could be transported for trial anywhere in the United States that a bank's "back office" work happened to be. No principled assessment of the money laundering statutes, the Constitution, the Rules of Criminal Procedure, or even the

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[1] In *Rodriguez-Moreno*, which concerned only *locus delicti*, the Court "express[ed] no opinion" on the Government's argument that venue may be based "upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense." 526 U.S. at 279, n. 2. In this case, the Government's argument will not be "effects," but that the Court not look to Bennett's acts (which took place in the Northern District of New York), but to any acts of the financial institutions, which could have occurred anywhere in the country.

"continuing offense" provision of 18 U.S.C. § 3237(a) supports that result.

The "nature of the crime" under Section 1956(a)(1)(B)(i) money laundering ("whoever . . . conducts or attempts to conduct such a financial transaction") is *not* back office bank processing. It is the defendant's act of depositing, transferring or withdrawing known illegal funds "to conceal or disguise the . . . unlawful activity." Section 1957 ("whoever . . . knowingly engages or attempts to engage . . . in a monetary transaction") is similarly focused on the defendant's conduct. The criminal acts alleged to have been committed by Petitioner occurred in the Northern District of New York, not the Southern District. Nor can a bank's back office processing fairly be said to establish money laundering as a "continuing offense" or an offense "begun in one district and completed in another" under 18 U.S.C. § 3237. The court below acknowledged that Petitioner had nothing to do with the back office processing (App. 24-25a). By looking to the bank's action, the Court of Appeals opened the door to venue being the accidental product of a bank's support staff's location.

Here, as in *United States v. Cabrales*, 524 U.S. at 7, Petitioner was not charged with conspiracy, and to make venue turn on the acts of a bank turns the *locus delicti* test into a farcical inquiry. Indeed, the Court of Appeals' rationale that "back office work" in the Southern District of New York made that district "particularly suitable for `accurate factfinding,'" because that district "is a financial center where money laundering cases are frequently tried" (App. 25a), is reminiscent of the venue theories advanced by the Government in *Cabrales* ("the Government urges the efficiency of trying Cabrales in Missouri . . . the Government further maintains that its convenience, and the interests of the community victimized

by drug dealers, merit consideration."). 524 U.S. at 9. In *Cabrales*, the Court rejected the Government's approach to venue; here, the Court should reject the notion that judicial familiarity with a particular crime is relevant to the venue inquiry.

The purpose of the venue provisions of the Constitution and the Rules of Criminal Procedure is to protect the defendant in a criminal case. Certiorari should be granted to review and decide the important unanswered question of the *locus delicti* of money laundering.[2]

II. THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION REGARDING THE APPLICATION OF RULE 52(B), FED.R.CRIM.P., TO MULTIPLE DEFECTIVE JURY INSTRUCTIONS

Rule 52(b), Fed.R.Crim.P., provides: "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the

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[2] The decision below held that the Southern District of New York "was a proper venue for the bank fraud and securities fraud counts (Counts 23, 24, 25, 31-33, 38) because it was there that certain victims surrendered their money based on false pretenses, thus `complet[ing]' those fraud offenses within the meaning of section 3237(a)." App. 24a. The two securities counts did not establish proof of venue, and the five bank fraud counts involved fortuitous transactions between a broker and three banks in New York. The thirty-five counts of money laundering were the most numerous counts of conviction, and when multiple counts are present, "venue must be proper on each count." *United States v. Villarini*, 238 F.3d 530, 533 (4th Cir. 2001). Thus, the improperly venued money laundering charges skewed the trial proceedings.

court." The jury instruction plain error cases usually involve defective single instructions. *See e.g., Johnson v. United States* 520 U.S. 461 (1997). This case involves multiple deficient instructions that omitted and misdescribed essential elements of the charged offenses, and presents the question of whether Rule 52(b) should be applied with recognition of the cumulative effect upon the due process right to a fair trial, rather than the individualized approach utilized below.

The court of appeals recognized that the trial court did not instruct the jury that a misrepresentation must be material to sustain a bank fraud conviction. App. 20a. There can be no doubt that that trial court failure was wrong. *Neder v. United States*, 527 U.S. 1, 25 (1999) ("Accordingly, we hold that materiality of falsehood is an element of the federal . . . bank fraud statutes"). Nevertheless, the "plain error" doctrine was invoked to preclude relief to Petitioner. App. 20a.

The court of appeals recognized that the failure to repeat the unanimity instructions for the bank fraud, securities fraud and all the money laundering counts was not the proper course, but concluded that the "plain error" standard prevented relief. App. 21a.

Plain error was also invoked to avoid relief based on the fact that the trial judge "did not tell the jury that an intent to harm was required to sustain the conviction[s]" for bank fraud. App. 21a.

Despite the fact that the court of appeals concluded *it was plainly erroneous* to tell the jury that "'ultimately everything would work out' was not sufficient to make out a good faith defense to the fraud counts," the court utilized a "plainly erroneous as applied" standard to avoid reversal of the

plainly erroneous instruction, an instruction that undermined Petitioner's good faith defense. App. 22a.

Finally the court below found that the conscious avoidance instruction's failure to include language "indicating that an 'actual belief' that nothing was amiss would be sufficient to negate *mens rea*" was wrong: "this was error." App. 23a.. But it found language in the instruction that "suffices to survive plain error review." *Id.*

Petitioner asked the Court of Appeals to address the cumulative effect of the errors: "Cumulative errors at trial may warrant reversal, even where the individual errors, by themselves, do not rise to the level of reversible error." Appellant's Brief, p. 57. The opinion below did not address that request. Other courts have concluded that cumulative errors, even cumulative plain errors, can so substantially affect the fundamental fairness of a trial that reversal is required. *See United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993); *United States v. Necoechea*, 986 F.2d 1273, 1282-83 (9th Cir. 1993). This Court has never addressed that question.

There is no question but that the failure to instruct the jury on materiality *vis á vis* the bank fraud charges deprived Petitioner of his constitutional right to have the jury decide each element of the crime. But for his failure to object, Petitioner would have been entitled to relief under *Neder*, *supra*. And, while Justice Scalia's partial dissent and concurrence in *Neder* accepted that a *Neder* error, even if viewed as "structural,"would still be subject to the plain error standard of *United States v. Olano*, 507 U.S. 725 (1993). *Neder*, 527 U.S. at 39 (Scalia, J., dissenting), no case has presented the confluence of jury instruction plain errors

acknowledged to be present here – errors that go to the integrity of the fact-finding process because they omitted and misdescribed essential elements of the offense. In such a case of cumulative plain error ("*how many* elements can be taken away from the jury with impunity[?]") (*id.* at 33) (emphasis in original), the Court should consider whether Rule 52(b) must be applied to the totality of the circumstances, not to the individual errors in isolation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED MAY 31, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2000

Argued: May 1, 2001 Decided: May 31, 2001

Docket No. 00-1330

UNITED STATES OF AMERICA,

Appellee,

v.

PATRICK BENNETT,

Defendant-Appellant.

Before: NEWMAN and CABRANES, *Circuit Judges*; and THOMPSON,* District Judge.

* * *

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* Honorable Alvin W. Thompson of the United States District Court for the District of Connecticut, sitting by designation.

Appendix A

JON O. NEWMAN, *Circuit Judge.*

This appeal primarily concerns the authority of a sentencing judge to enhance a defendant's sentence because his wife refused to surrender properties alleged to have been purchased with proceeds of the defendant's crimes. Patrick Bennett appeals from the July 5, 2000, judgment of the United States District Court for the Southern District of New York (John S. Martin, Jr., District Judge), convicting him, after a jury trial, of various offenses, including money laundering, and sentencing him to a term of thirty years. The sentence resulted from an upward departure of ten years imposed because of the wife's recalcitrance. We conclude that the challenged departure is not permissible because it undermines the wife's statutory entitlement to resist forfeiture of her interest in the properties at issue. The Defendant's challenges to his conviction have been rejected in a summary order filed this date. In this opinion, we vacate the sentence and remand for resentencing.

Background

Bennett was the chief financial officer of Bennett Financial Group (BFG), a family business nominally headed up by his parents, based in Syracuse. The firm leased photocopying machines, primarily to offices in state and local governments. After originating a lease, the firm often sold the lease to an investor; BFG would collect payments on the lease for the investor, who was supposed to get a low-risk stream of cash.

The indictment alleged offenses of four kinds. First, Bennett allegedly ran a massive pyramid scheme through

BFG, selling fictitious leases to investors and pledging or selling legitimate leases twice over to different parties. These pyramid scheme allegations supported mail fraud and securities fraud counts. Second, Bennett allegedly shifted the cash generated by pyramid sales into an unaudited shell company, supporting several money laundering counts. Third, Bennett allegedly inflated BFG's profitability in financial statements submitted to banks and investors who loaned money to BFG. These allegations supported bank fraud and additional securities fraud counts. Fourth, Bennett deceived SEC investigators, supporting public integrity counts such as perjury and obstruction of justice.

There have been two trials. At each trial, the Government submitted evidence that would have permitted conviction on all the counts and that sufficed to permit sentencing for conduct not resulting in convictions. The first jury convicted only on the public integrity crimes, and hung on all the other issues. The second jury also hung on the pyramid scheme counts, but convicted on the money-laundering counts and on the bank fraud and securities fraud counts related to the inflated financial statements. This jury also returned a forfeiture verdict of $109 million.

Judge Martin conducted several sentencing hearings. First, he heard objections to the presentence report, and determined that Bennett's adjusted offense level under the Sentencing Guidelines was 36.[1] In Criminal History Category

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1. 36 was the adjusted offense level for the "group" of fraud offenses. *See* U.S.S.G. Part D (1988) (grouping rules). This level was derived from a base offense level of 6, *id.* § 2F1.1(a), and

(Cont'd)

I, an offense level of 36 yielded a sentencing range of 188 to 235 months. Judge Martin made clear at this hearing that "it was very important that every dollar of money that [Bennett] and his family had taken from the investors in this case be repaid." A few months later, he held a second hearing to determine whether Bennett was withholding proceeds of his frauds. Judge Martin determined that certain assets in the name of Bennett's wife were fraud proceeds, including the family home and stock interests in a race track and a hotel. At this hearing, Judge Martin also made two rulings in advance of the final sentencing. First, he said that "the massive nature of the fraud, and the impact on the victims" justified an upward departure of five months. He also noted that "Mr. Bennett and his wife are still endeavoring to keep the proceeds of the fraud," and said that "based on [this] fact" he would additionally depart upward ten years, for a total sentence of 360 months (30 years), if the assets in question were not voluntarily surrendered before the final sentencing hearing. "Therefore, if at the time I come to impose sentence, these assets are not returned, I will impose a sentence of 360 months. So it is either 20 years or 30 years.

(Cont'd)
enhancements of 18 for losses of more than $80 million, *id.* § 2F1.1(b)(1)(S), 2 for more than minimal planning, *id.* § 2F1.1(b)(2), 4 for affecting a financial institution and receipts exceeding $1 million, *id.* § 2F1.1(b)(7)(B), 4 for being a leader of a criminal activity with more than five participants or that was otherwise extensive, *id.* § 3B1.1, and 2 for obstruction of justice, § 3C1.1. Judge Martin elected to use the adjusted offense level for the fraud group after concluding that the higher adjusted offense level for the money-laundering group of offenses was inapplicable because he considered Bennett's offenses not to be a "heartland" money-laundering offense.

The determination of that is [up] to Mr. and Mrs. Bennett." At the time, separate forfeiture proceedings were pending, in which Bennett's wife would have the opportunity to assert an innocent owner defense with respect to the assets in question.

The final sentencing hearing occurred a month later, on April 28, 2000. Bennett's counsel sought to avoid the threatened 10-year departure by contending that two of the three assets at issue were no longer effectively under Mrs. Bennett's control. He contended that the racetrack stock was the subject of an interpleader action and that she was negotiating an agreement to sell her stock in the hotel.[2] He claimed that she was relinquishing all claim to these two assets, but conceded that she was refusing to surrender the family home and surrounding acreage.

Judge Martin made no finding as to whether the racetrack stock and the hotel stock were no longer under Mrs. Bennett's control, as defense counsel contended. After affording Bennett his right of allocution, Judge Martin imposed an aggregate sentence of thirty years, noting explicitly that the ten-year component of the upward departure would not have been imposed had Bennett and his wife surrendered their assets.[3]

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2. Mrs. Bennett worked at the hotel, and sought to exchange her stock for one year's salary.

3. The record is clear that Judge Martin imposed the upward departure because Bennett and his wife refused to surrender the house and surrounding acreage. Judge Martin's reference to their failure to surrender "assets" strongly implies that he was not persuaded by defense counsel's representations concerning the racetrack stock and the hotel stock, and was basing the upward departure on the failure to surrender these assets as well.

He also granted the Government's application for an order requiring Bennett to forfeit $109 million. An amended order of forfeiture was entered on October 5, 2000, forfeiting all of the Defendant's interests in three properties, two of which are identified in the order as held in the name of Mrs. Bennett.[4] In a memorandum decision, Judge Martin denied as premature Mrs. Bennett's request to intervene to assert claims to the forfeited properties. The forfeiture order is subject to a separate appeal.

Discussion

I. Upward Departure

Bennett challenges his sentence primarily on the ground that the District Court erred in enhancing the sentence by ten years because of the refusal of Bennett's wife to surrender her interest in the family home and other assets. We find very little precedent bearing on this issue. It is unusual for a sentencing judge to select a presumptive sentence and then state that the sentence will be increased if some action the judge deems appropriate is not taken.[5] It is even more unusual

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4. The three properties listed in the amended order of forfeiture are the family home and surrounding 98-acre lot in Oneida, New York, in the name of Gwen Bennett, another lot in Oneida in her name, and a lot in Sherrill, New York, in the name of The Andrick Irrevocable Trust. Of these three properties, only the family home and surrounding acreage are among the properties that Judge Martin indicated had to be surrendered by the Bennetts to avoid the ten-year enhancement of the Defendant's sentence.

5. This situation is superficially similar to that of a defendant who receives a higher sentence upon conviction after trial than he

(Cont'd)

to use the threat of an increased sentence to compel action by someone other than the defendant.[6] We need not explore

(Cont'd)
would have received if he had pled guilty. However, as we have previously explained, the lower sentence after a guilty plea reflects a "reduction from a sentencing norm ascertained independent of the procedure by which guilt is ascertained. A sentence imposed upon a defendant who stands trial is that norm; it is not an enhancement above the norm as a cost of standing trial." *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992). The lawfulness of a discount for pleading guilty is well settled. *See Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978); *Brady v. United States*, 397 U.S. 742, 750-51 (1970); *Cruz*, 977 F.2d at 733-34; *United States v. Parker*, 903 F.2d 91, 105 (2d Cir. 1990). We have prohibited an increased sentence "above an otherwise appropriate sentencing norm" where the trial judge's pretrial statements to the defendant "created an unacceptable risk . . . [of] penaliz[ing] the defendant for exercising his constitutional right to stand trial." *Cruz*, 977 F.2d at 734.

6. We have located two reported cases in which a prosecutor afforded a defendant the benefit of a favorable plea bargain only on condition of action by others. In *United States v. Clements*, 992 F.2d 417 (2d Cir. 1993), the Government offered a group of co-defendants a plea bargain conditioned on its acceptance by all of them. *Id.* at 418. The appellant, who had accepted the plea bargain, later tried to withdraw his plea, contending that the joint plea arrangement was "inherently coercive," *id.* at 419. We rejected that claim on the ground that a prosecutor "may impose conditions [in a plea agreement] which relate to the conduct or treatment of others." *Id.* (citing *United States v. Marquez*, 909 F.2d 738 (2d Cir. 1990)). By citing *Marquez*, we evidently understood Clements to be contending that there was undue pressure on him to plead, arising from the fact that his co-defendants would not benefit from the plea bargain unless he pled. We ruled, following *Marquez*, that the voluntariness of a guilty plea is not undermined just because the plea is induced by a defendant's desire

(Cont'd)

generally the extent of a sentencing judge's authority to use the threat of increased punishment to compel action by a defendant or another person because in this case the use of such power conflicts with the statutory remedy that Congress has established to recapture the proceeds of various unlawful activities, including money laundering. *See* 18 U.S.C. § 982. That remedy is available to recapture proceeds in the hands of a third party, *id.* § 982(b)(1) (incorporating provisions of 21 U.S.C. § 853(c)), subject to the third party's opportunity to establish a right of ownership superior to the Government's or a status as a bona fide purchaser reasonably without cause to believe that the property was subject to forfeiture, *see* 21 U.S.C. § 853(n)(6).

(Cont'd)
to benefit others. Clements's case would be more analogous to Bennett's if Clements had gone to trial after his co-defendants turned down the plea, and he had then complained that he had been denied favorable treatment because they had refused to plead.

In *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992), a defendant was offered a favorable plea bargain conditioned on his wife's forfeiture of property. *See id.* at 137. When she refused, his trial was scheduled. His (interlocutory) appeal raised only a double jeopardy claim, based on a prior conviction and did not challenge the conditioning of a favorable plea agreement on her conduct. The double jeopardy claim was rejected, but the condition of the refused plea bargain evoked strong criticism from one judge of the panel: "[W]hen the value of a prisoner is measured by the sum others might pay for the state's leniency, I am forced to ponder whether the morality of government has improved in the past six hundred years." *Id.* at 142 (Hall, J., concurring).

Neither *Clements* nor *McHan* involves a threat by a prosecutor or a judge to accord a defendant adverse treatment in the event that a third party fails to act.

In this case, the threat of enhanced punishment in the event that the Defendant's wife does not surrender properties she claims are hers would undermine the statutory right accorded her by the forfeiture statute. The Government has obtained an order of forfeiture for at least one of the properties at issue — the family home. That proceeding, which is the subject of a separate appeal, will determine whether this and other properties have been forfeited to the Government or belong to Mrs. Bennett. The ten-year sentencing enhancement was designed to cause her to surrender her statutory rights (whatever their ultimate merit), and the impermissibility of imposing punishment for that purpose is not avoided simply because Mrs. Bennett stood her ground and refused to accept the sentencing judge's offer not to enhance her husband's sentence if she capitulated.

Judge Martin expressed the view that his enhancement was analogous to the sentencing that we approved in *United States v. Merritt*, 988 F.2d 1298 (2d Cir. 1993). In *Merritt*, Judge Martin departed upward in sentencing a defendant for conspiracy to defraud the United States. We described the grounds of the departure as follows:

> The defendant, having obtained nearly $1 million through a fraud scheme, concealed the large proceeds through a series of disguised international corporate and bank transactions; even after his guilty plea, the defendant engaged in an elaborate scheme, which included falsely claiming to have paid for the merchandise, fraudulently concealing his ownership of real property, and falsely claiming to be no longer in

> possession of the benefits of the fraud, with the result that, after service of a modest period of imprisonment, he would enjoy the remainder of his life cushioned by the concealed million dollar fraud proceeds.

Id. at 1306. We affirmed the sentence, rejecting the defendant's contention that it was impermissibly based on factors already adequately considered by the Sentencing Commission — failure to pay restitution and concealment of assets. *Id.* at 1310-11. We concluded that Judge Martin was entitled to find that Merritt's conduct went far beyond "simple" failure to pay restitution and concealment, and that his "elaborate fraudulent manipulation" was an aggravating circumstance warranting an upward departure under 18 U.S.C. § 3553(b). *Merritt*, 988 F.2d at 1311.

Bennett's case would arguably be analogous to Merritt's if Judge Martin had imposed the enhancement as added punishment for Bennett's own conduct in transferring to his wife's name assets obtained from proceeds of the crimes. In that event, the issue would be whether the departure standard has been met, *i.e.*, whether there were circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b). However, the enhancement for Bennett was explicitly imposed because he *and his wife* refused to surrender the properties. As Judge Martin made clear at sentencing, "If Mr. and Mrs. Bennett appeared in this courtroom today and said that all of the assets under their control would be turned over to the trustee to benefit the investors in this case, I would impose a 20-year sentence." Whether or not Mrs. Bennett

was refusing at the Defendant's behest, which Judge Martin believes,[7] he cannot be punished because she will not relinquish her statutory right to contest the forfeiture of properties in her name.

Some might suggest that, even if a defendant may not have his sentence enhanced because of his wife's failure to surrender alleged proceeds of his crimes, he should receive additional punishment for his own failure to urge her to do so. The difficulty with this argument is that it too easily becomes an indirect way to punish for the wife's refusal: a husband who claims to have urged his wife to surrender the property will risk being disbelieved unless his wife complies; realizing that risk, the wife is pressured to comply to spare her husband the additional time that would be imposed because of the sentencing judge's disbelief that the husband has sincerely urged her to capitulate. Such risks are avoided by limiting sentencing enhancements, otherwise appropriate, to a defendant's own egregious conduct in concealing the proceeds of his crimes, leaving the Government free to use its ample resources to obtain forfeitable property held by others. On remand, Judge Martin will be entitled to consider whether, apart from Mrs. Bennett's refusal to surrender the properties, the Defendant's own acts of concealment or any

7. At sentencing Judge Martin said, "Indeed, his continued use of these assets by him and his family, which he controls, and that was quite clear from the letter that he sent to me, there is no claim here that Mrs. Bennett isn't willing to do this, but Mr. Bennett wants it. It's quite clear from all his statements to the court that this is conduct he is controlling." In fact Mrs. Bennett testified that she was not willing to surrender the properties: "It's an admission of guilt, and I just can't do that. I can't belittle myself that way. I truly believe that they are mine."

other appropriate factors warrant a departure above the twenty-year sentence he stated would have been imposed had the properties been surrendered.

We fully understand Judge Martin's concern to aid the victims of Bennett's crimes. He was anxious not only to restore to them at least a portion of their losses but also to avoid the distress of their "see[ing] his wife living in luxury on . . . assets purchased with their money." Despite the legitimacy of these objectives, they may not be achieved by the threat of added punishment for Bennett unless his wife surrenders her statutory right to contest the forfeiture of properties that are at least nominally hers.

II. Other Sentencing Challenges

Bennett's other challenges to his sentence are without merit and require little discussion.

Evidentiary standard. Bennett contends that, because the loss calculation was significantly augmented by the relevant conduct of the pyramid-scheme offenses on which no verdicts were returned, Judge Martin should have been required to establish this conduct beyond a reasonable doubt. He relies on dictum in *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997), that was rejected in *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000) (preponderance standard proper to sustain large upward adjustments or upward departures); *see also United States v. Watts*, 519 U.S. 148, 154-57 (1997) (preponderance standard may be used at sentencing to establish conduct for which a defendant was

acquitted).[8] Moreover, Judge Martin found that the evidence "established beyond any conceivable doubt that [Bennett] was the prime mover in a fraud that took hundreds of millions of dollars from the victim investors." *United States v. Bennett*, No. 97 CR 639 JSM, 2000 WL 420547, at *1 (S.D.N.Y. Apr. 18, 2000).

Fraud loss. Bennett challenges the District Court's finding of a fraud loss of more than $80 million. Judge Martin indicated that he had "reviewed the presentence report, reviewed the voluminous submissions with respect to the sentencing and accept[ed] the determination of the Probation Department with respect to the calculation of the guideline range with respect to the fraud guideline." The Probation Department estimated loss for the pyramid scheme only. With respect to this scheme, the Probation Department found that the annual income from the sale of lease products to investors exceeded the value of the leases originated by more than $200 million in 1994 and again in 1995. By the time BFG filed for bankruptcy, the aggregate shortfall between the amount owed lease investors and the value of the collateral was approximately $600 million. A court, relying on findings of the Probation Department, "need only make a reasonable estimate of the loss, given the available information," U.S.S.G. § 2F1.1, cmt. n.9, and we are satisfied that Judge

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8. "[T]he *Shonubi* statements are better understood as an expression of concern that, in certain cases, the enhancement of a sentence based upon a defendant's 'relevant conduct,' if done without regard to the weight of the evidence proving the relevant conduct, may result in a total term of incarceration which is excessive, inappropriate, and unintended under Sentencing Guidelines." *Cordoba-Murgas*, 233 F.3d at 708 (citation omitted).

Martin properly estimated a loss substantially in excess of $80 million.

Affecting a financial institution. Bennett challenges the four-level enhancement that is authorized "[i]f the offense . . . affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense." U.S.S.G. § 2F1.1(b)(7)(b). A defendant must "individually" derive $1 million from the offense, and gross receipts include all amounts "obtained directly or indirectly as a result of the offense." *Id.* § 2F1.1 cmt. n.18. The presentence report documented fraudulent bank borrowings of $407 million by BFG; transfers of $1 billion from BFG to Bennett Management and Development Corporation ("BMDC"), a shell company owned by Bennett and his brother; and distributions of $13 million from BMDC to Bennett's personal bank and brokerage accounts.

Bennett contends that he "received no direct personal benefit" from the bank loans, Brief for Appellant at 78, claiming that the loan proceeds were "used to purchase the leases sold to the banks." Reply Brief for Appellant at 55. Whether or not all the loan proceeds were used to purchase leases, the enhancement is available for a defendant who derives at least $1 million "*indirectly* as a result of the offense." U.S.S.G. § 2F1.1 cmt. n.18 (emphasis added). There is no serious dispute that the fraudulent bank loans facilitated the fraudulent schemes that enabled Bennett to shift millions of dollars from BFG to BMDC and then into his personal accounts. *See United States v. Monus*, 128 F.3d 376, 397 (6th Cir. 1997) ("[T]he defendant must derive a million dollars from the offense, not from the financial institutions.").

Appendix A

Organizer. Bennett challenges the enhancement for being an organizer or leader of a criminal activity with five or more participants. *See* U.S.S.G. § 3B1.1(a). Whether or not his activity involved five participants, the enhancement applies so long as the criminal activity was "otherwise extensive," for example, a fraud involving the "unknowing services of many outsiders." *Id.* cmt. n.3. This circumstance is applicable to Bennett's conduct because his frauds involved a wide array of witting or unwitting brokers, accountants, and bankers. Bennett also argues that his planning was double-counted to support both the organizer enhancement under section 3B1.1(a) and the enhancement for "more than minimal planning, or . . . a scheme to defraud more than one victim" under section 2F1.1(b)(2). However, both enhancements were properly applied. Section 2F1.1(b)(2) provides that the two-level enhancement may be premised on more than minimal planning *or* the fact that "more than one victim" was defrauded, and both grounds applied to Bennett. Where, as here, there are multiple fraud victims, Bennett's role as planner could be used to support the four-level increase under section 3B1.1(a) without precluding application of section 2F1.1(b)(2). *Compare United States v. Greenfield*, 44 F.3d 1141, 1146 n.3 (2d Cir. 1995) (same planning conduct cannot be used to justify both enhancements).

Obstructing justice. Bennett contends that his offense level should not have been increased for obstructing justice, U.S.S.G. § 3C1.1, because he obstructed only the SEC investigation, and not his criminal prosecution. However, the enhancement applies to efforts to obstruct an "official investigation," *id.* cmt. n. 4(d), which includes investigations

that occur prior to the indictment. *See also United States v. Zagari*, 111 F.3d 307, 328 (enhancement can be premised on obstruction of civil investigation closely related to criminal prosecution).

Eighth Amendment. Finally, Bennett challenges his sentence as being so disproportionate to his conduct as to violate the Eighth Amendment. Our review of such challenges is very limited. In assessing the constitutionality of a sentence under the Eighth Amendment, the court must assess the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 292 (1983). Whether the final sentence is thirty years or twenty years (or something in between), we think there is no disproportion between sentence and conduct. Bennett's conduct wiped out the savings of thousands of people, and is not longer than the sentences meted out in other large fraud cases. *See United States v. Helms*, 897 F.2d 1293, 1299 (5th Cir. 1990) (fraud sentences of 75 years and 60 years were not disproportionate), *overruled on other grounds*, *United States v. Huntress*, 956 F.2d 1309, 1317 (5th Cir. 1992); *United States v. Hoffenberg*, Nos. 44 Cr. 213 (RWS), 95 Cr. 321 (RWS), 1997 WL 96563 (S.D.N.Y. March 5, 1997) (twenty year sentence where loss to investors was $478 million).

Appendix A

Conclusion

The sentence is vacated and remanded for further proceedings consistent with this opinion.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of May, two thousand and one.

PRESENT: HONORABLE JON O. NEWMAN
HONORABLE JOSE A. CABRANES,
Circuit Judges.
HONORABLE ALVIN W. THOMPSON,*
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v.

PATRICK BENNETT,

Defendant-Appellant.

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* Honorable Alvin W. Thompson of the United States District Court for the District of Connecticut, sitting by designation.

Appendix A

APPEARING FOR APPELLANT: Paul E. Wagner, Brown, Pinnisi & Michaels, Ithaca, N.Y.

APPEARING FOR APPELLEE: Patrick J. Smith, Asst. U.S. Atty., New York, N.Y.

U.S. v. Bennett

Docket No. 00-1330

Appeal from the United States District Court for the Southern District of New York (John S. Martin, Jr., Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED IN PART AND VACATED AND REMANDED IN PART. The convictions are affirmed in this Order; the sentence is vacated and remanded in an opinion filed this date.

Following two trials, defendant Patrick Bennett was convicted of two counts of conspiracy to obstruct justice and commit perjury, one count of obstruction of justice, four counts of perjury, two counts of securities fraud, five counts of bank fraud, thirty counts of money laundering, and five counts of engaging in monetary transactions with criminally derived property. These counts were based on Bennett's attempt to thwart an SEC investigation, his borrowings from investors and banks using inflated income statements, and his attempts to hide cash by transferring it into unaudited

accounts. The second jury also returned a forfeiture verdict of $109 million. Neither jury could agree on certain mail fraud and securities fraud counts. These counts were based on an alleged pyramid scheme, in which Bennett sold cash flow streams from photocopier leases that did not exist.

Bennett was sentenced to thirty years' imprisonment. In a published opinion filed today, we have vacated Bennett's sentence and remanded for resentencing. In this order we reject Bennett's challenges to his conviction.

I. Jury Instructions

Bennett alleges several errors in the jury instructions, but because he did not object to most of them at trial, our review is for plain error affecting substantial rights. Fed. R. Crim. P. 30, 52 (b) .

Materiality. Bennett contends that Judge Martin failed to instruct the jury that a misrepresentation must be material if it is to sustain a bank fraud conviction. However, at the beginning of his instructions, Judge Martin told the jury that *all* frauds require a material misrepresentation, he distinguished between material and immaterial misrepresentations with care, and he told the jury to bear the distinction in mind for the bank fraud, securities fraud and mail fraud counts. While it might have been useful to re-emphasize this distinction when bank fraud was described later in detail, the failure to do so was not plain error.

Unanimity. Judge Martin gave a general instruction on unanimity and also instructed that "in any case in which I

tell you there are alternate grounds on which you can rest a finding of guilt, you must be unanimous as to one of those grounds before you can find the defendant guilty on that count." Bennett argues that, for all the bank fraud counts, certain of the securities fraud counts, and all of the money-laundering counts, Judge Martin erred by failing to repeat this instruction. Although repetition of unanimity instructions is recommended in complex cases, *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986), we have suggested that failure to repeat a general instruction is never plain error, *United States v. Peterson*, 768 F.2d 64, 68 (2d Cir. 1985), arid was surely not here.

Mens Rea. Bennett contends that Judge Martin erred in his charge on the *mens rea* required to sustain bank fraud and securities fraud. For both the securities fraud and the bank fraud counts, Judge Martin did not tell the jury that an intent to harm was required to sustain the conviction. However, where the borrower has knowingly misstated his ability to pay back a loan, a trial judge does not plainly err by omitting an intent to harm instruction from a bank fraud charge. *United States v. Chandler*, 98 F.3d 711, 716 (2d Cir. 1996). Nor is there error on the securities fraud charge, because intent to harm is not an element of securities fraud at all. *United States v. Chiarella*, 588 F.2d 1358, 1371 (2d Cir. 1978), *rev'd on other grounds*, 445 U.S. 222 (1980).

Bennett also contends that it was plain error for Judge Martin to tell the jury that Bennett's belief that "ultimately everything would work out" was not sufficient to make out a good faith defense to the fraud counts. Although this instruction was found to be plainly erroneous in *United States*

v. Rossomando, 144 F.3d 197 (2d Cir. 1998), in that case it was clear from the evidence that, if the defendant had any belief that the victim would not be harmed, the belief would necessarily have extended to both ultimate and immediate harms. However, we have ruled that the instruction is not plainly erroneous where, as here, the evidence indicates that the defendant might have hoped only for ultimate gains that would mask the immediate loss or risk of immediate loss created by his misrepresentations. *See United States v. Berkovich*, 168 F.3d 64, 67 (2d Cir. 1999).

Bennett next argues that Judge Martin erred in giving a conscious avoidance instruction, to which objection was made. The instruction may be given only if the evidence would permit a rational juror to conclude that the defendant was aware of a high probability of the fact in dispute, and consciously avoided confirming that fact. *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000). Although the Government argued exclusively that Bennett had actual knowledge of the pyramid scheme, Bennett himself inadvertently raised the possibility that he had consciously avoided obtaining actual knowledge of fraud. His defense to the fraud charges was that he was too "foolish and negligent" to have appreciated the existence of fraud, even though he admitted being aware of facts that would have indicated a high probability of fraud. Under these, circumstances, there was an adequate factual basis for the charge.

Bennett also challenges the wording of the conscious avoidance instruction because Judge Martin did not balance the instruction with language indicating that an "actual belief" that nothing was amiss would be sufficient to negate

mens rea. Although this was error, *United States v. Sicignano*, 78 F.3d 69 (2d Cir. 1996), Bennett did not object to the wording of the instruction, and Judge Martin's instruction that "careless, negligent or even foolish" behavior could not establish the requisite *mens rea* suffices to survive plain error review, *United States v. Feroz*, 848 F.2d 359, 361 (2d Cir. 1988).

II. Variance and Constructive Amendment

Bennett contends that the jury charge on money laundering effected a constructive amendment of the indictment because the indictment alleged that the laundered funds were the proceeds of "mail fraud, wire fraud, and fraud in the sale of securities," and the jury charge added "bank fraud." Bennett's claim derives from the jury's inability to return verdicts on the pyramid scheme counts, leading him to speculate that the money laundering verdicts must have been based on bank fraud. However, there was no objection to the jury charge, and the Government neither argued nor presented evidence that the money laundering was based on bank fraud. Moreover, the charge repeatedly focused the jury's attention on defrauding the investors (not banks) as the basis of the money laundering counts. Finally; the verdict form prominently identified the investor frauds as the basis for, the money laundering counts.

The absence of objection either to the fleeting mention of bank fraud in the money-laundering charge or to what Bennett now claims is an inconsistency in the verdicts is persuasive that no one at the trial thought the jury was being

asked to base money laundering verdicts on bank fraud. There was no reasonable likelihood that the jury understood the indictment to have been amended.

III. Venue

Bennett challenges venue for the bank fraud, securities fraud, money-laundering and monetary transactions convictions. The Sixth Amendment limits venue to the district the crime was "committed," and the Supreme Court has said that place of commission "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (internal quotation marks omitted). Federal crimes may be prosecuted in all venues where the offense was "begun, continued, or completed." 18 U.S.C. § 3237(a).

The Southern District of New York was a proper venue for the bank fraud and securities fraud counts, because it was there that certain victims surrendered their money based on false pretenses, thus "complet[ing]" those fraud offenses within the meaning of section 3237(a). *See also United States v. Reed*, 773 F.2d 477, 482 (2d Cir. 1985) (Congress may lay venue "where the effects of the crime are felt"). Similarly, venue on the money-laundering and monetary transactions counts was proper because the back office processing by the banks and clearing agents (required to shift the money to the unaudited accounts) took place in Manhattan, making the Southern District one site where the financial transactions criminalized by sections 1956 and 1957 could be said to have been conducted. Although these steps in the commission of the offense were minor ones, and were not committed by

Bennett or anyone at his company, they were part of the crime described by those statutes and therefore sufficed to support venue in the Southern District. *See, e.g., United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (venue was proper where defendant fraudulently obtained money from his employer using a fax machine located within the district, even though defendant directed the scheme from outside the district). Unlike *United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999), where venue was improperly laid in a district through which mail passed, a bank's back office work is apt to occur (as here) in a single district, and the court in that district may be particularly suitable for "accurate factfinding," *Reed*, 773 F.2d at 481, because the district in question is a financial center where money laundering cases are frequently tried.

IV. Other grounds

We have considered all of Bennett's other contentions, including his challenges to the sufficiency of the evidence and to the denial of his motion for Judge Martin's recusal, and conclude that they lack merit.

For all of these reasons, the convictions are affirmed. As explained in the opinion filed this date, the sentence is vacated and remanded for reconsideration.

FOR THE COURT,
ROSEANN B. MacKECHNIE, Clerk

By s/ Ralph A. Anderson
RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 29, 2001

UNITED STATES COURT OF APPEALS
For The Second Circuit
United States Court House
40 Foley Square
New York 10007

ROSEANN B. MacKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse. Foley Square, in the City of New York, on the 29th day of October, two thousand one.

Dkt No: 00-1330

USA

Appellee,

v

BENNETT

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Patrick R. Bennett, pro se.

Appendix B

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MacKECHNIE, Clerk

By: s/ [illegible]
Administrative Attorney